APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JANUARY 22, 1998

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-5375

District Court No. 94-8360CV-KLR

MARK BLEDSOE,

Plaintiff-Appellant,

versus

PALM BEACH COUNTY SOIL AND WATER CONSERVATION DISTRICT,

Defendant-Appellee,

BOARD OF COUNTY COMMISSIONERS FOR PALM BEACH COUNTY,

Defendant.

Appeal from the United States District Court
for the Southern District of Florida

(January 22, 1998)

Before DUBINIA and BARKETT, Circuit Judges, and HILL, Senior Circuit Judge

Appendix A

DUBINIA, Circuit Judge:

Appellant, Mark Bledsoe ("Bledsoe") appeals the district court's grant of summary judgment to the Palm Beach County Soil and Water Conservation District ("District"), on Bledsoe's claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. Section 12131 ("Title II") and the Rehabilitation Act, 29 U.S.C. Section 701, *et seq.* This case involves an issue of first impression in our circuit: whether Title 11 of the ADA encompasses employment discrimination. We answer the question in the affirmative and, accordingly, we reverse the district court's grant of summary judgment and remand this case for further proceedings consistent with this opinion.

I. *BACKGROUND*

Bledsoe was employed as a Resource Technician for the District from January 1988 until his termination in October of 1992. In his employment, Bledsoe had to spend a large portion of his time walking, surveying, and performing manual labor in the fields. While performing his duties, on February 26, 1990, Bledsoe sustained an injury to his knee for which he made a claim for workers' compensation benefits. Based on the advice of his doctors that he should refrain from excessive walking and walking on uneven terrain, Bledsoe requested some form of accommodation from his supervisor. In response, the District offered Bledsoe the position of Resource Conservationist, but he rejected the offer. In October 1992, the District terminated Bledsoe.

Subsequent to his termination, Bledsoe settled his workers' compensation case with Palm Beach County.[1] The joint settlement

1. At all relevant times, the District was Bledsoe's employer; however, because the District had no more than five employees at a time, it participated in (Cont'd)

agreement entered into by the parties contained the following partial release provision:

> As further consideration for the aforementioned payment, the Employee/Claimant agrees and does hereby release, discharge, and surrender any and all claims, whether or not asserted, against the Employer/ Carrier or Servicing Agent, or any of its officers, agents, servants, employees, directors, successors, assigns, and any other person or entity so connected to the Employer/Carrier or Servicing Agent, of any nature whatsoever, excepting only (1) future medical pursuant to other provisions of this agreement, or (2) penalties, interest or attorneys' fees which might be due because of failure to pay order approving this Joint Petition within 30 days.

R1-34-Exh. A.

Bledsoe filed suit on June 24, 1994, against the District and Palm Beach County alleging that both of those entities were his "employer" within the meaning of Title I of the ADA and the Rehabilitation Act and had violated his rights protected by those acts. Specifically, Bledsoe alleged that he had a disability within the meaning of the law, that the defendants had failed to accommodate his disability, and that the defendants discharged him as a result of his disability. Palm Beach County filed a motion

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Palm Beach County's insurance plans, including its workers' compensation plan. For a fee, the County adjusted workers' compensation claims made against the District. Therefore, Palm Beach County was the District's workers' compensation carrier and the party with whom Bledsoe settled his workers' compensation claim.

to dismiss arguing that it was not Bledsoe's "employer" for purposes of the claims and that it had been released from the claims by virtue of Bledsoe's partial release of his workers' compensation benefits. After consideration, the district court determined that Palm Beach County was not Bledsoe's employer and, therefore, summary judgment should be entered for it on all claims. Bledsoe has not appealed the district court's disposition that the County was not his employer.

The litigation continued against the District. Because the District alone did not have the requisite number of employees to effect coverage under Title I of the ADA,[2] Bledsoe sought leave to amend the complaint to bring his claim under Title II, and the district court granted leave. The District filed a motion for summary judgment arguing first that Title II of the ADA does not apply to discrimination in employment and, second, that the partial release in Bledsoe's joint settlement agreement with the County released his claims against the District. Bledsoe opposed the motion. The district court entered summary judgment for the District on both Bledsoe's ADA and Rehabilitation Act claims. Bledsoe then perfected this appeal.

II. *DISCUSSION*

Bledsoe raises two issues for our review: (1) whether the district court properly concluded that the workers' compensation release bars Bledsoe's federal claims of employment discrimination; and (2) whether the district court properly determined that Title II of the ADA does not apply to

2. The term "employer" in Title I is defined as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. . . ." 42 U.S.C. § 12111(5).

discrimination in employment. We review the district courts order granting summary judgment *de novo. Parks v. City of Warner Robins, Ga.*, 43 F.3d 609, 612 (11th Cir. 1995). After conducting our review, we conclude that the district court improperly found that the workers' compensation release barred Bledsoe's federal claims of employment discrimination and that Title II does not encompass employment discrimination.

A. *Workers' Compensation Release*

In its determination that the workers' compensation release barred Bledsoe's ADA and Rehabilitation Act claims, the district court relied on *F.M. v. Palm Beach County*, 912 F.Supp. 514 (S.D. Fla. 1995), *aff'd F.M. v. County Comm'rs*, 84 F.3d 438 (11th Cir. 1996)(Table). On appeal, Bledsoe contends that the district court erred in relying on *F.M. v. Palm Beach County*. He argues that the issue should have been analyzed under this circuit's decision in *Puentes v. United Parcel Service, Inc.*, 86 F.3d 196 (11th Cir. 1996). Bledsoe is correct.

The Supreme Court has stated that an employee can waive his "cause of action under Title VII as part of a voluntary settlement agreement" if "the employee's consent to the settlement was voluntary and knowing." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52, n. 15 (1974). The same principles should be equally applicable to waiver of rights under Title II of the ADA. *See Rivera-Flores v. Bristol-Myers Squibb Caribbean*, 112 F.3d 9 (1st Cir. 1997). The waiver of such remedial rights, however, "must be closely scrutinized," and a court must look to the totality of the circumstances to determine whether the release is knowing and voluntary. *Puentes v. United Parcel Service*, 86 F.3d at 198.

In *Puentes*, the plaintiffs, at the time of their terminations, were offered substantial severance packages and the ability to

resign "for personal reasons" on the condition that they execute unambiguous release agreements waiving all employment discrimination claims arising out of their terminations. Both plaintiffs executed the agreements, but later filed suit against UPS alleging racial and national origin discrimination. UPS moved for summary judgment, which the district court granted. On appeal, this court reversed, concluding that a jury should decide whether the releases were knowingly and voluntarily executed.

The *Puentes* court explained that the following factors bear on whether a release is knowing and voluntary:

> the plaintiffs education and business experience; the amount of time the plaintiff considered the agreement before signing it; the clarity of the agreement; the plaintiff's opportunity to consult with an attorney; the employer's encouragement or discouragement of consultation with an attorney; and the consideration given in exchange for the waiver when compared with the benefits to which the employee was already entitled.

86 F.3d at 198 (*quoting Beadle v. City of Tampa,* 42 F.3d 633, 635 (11th Cir.), *cert. denied,* 515 U.S. 1152 (1995)). When reviewing these factors in *Puentes,* the court determined that the plaintiffs did not have sufficient time to consider their release agreements and neither plaintiff had consulted with an attorney. The court also noted that neither plaintiff had any role in deciding the terms of the agreement; the plaintiffs were simply handed printed forms. 86 F.3d at 199. These factors raised a genuine issue of material fact as to whether plaintiffs voluntarily and knowingly executed the release agreements. Accordingly, the issue could not be resolved by summary judgment.

The factors set forth in *Puentes* should have been considered by the district court in this case. The district court should not have summarily adopted a decision from another case, even though it dealt with the exact same release form. Each factor should be independently analyzed. In applying the *Puentes* factors, we conclude that a jury question exists about whether Bledsoe voluntarily and knowingly released ADA and Rehabilitation Act claims. The language of the release indicates that Bledsoe was only settling his claim for wage loss benefits under the workers' compensation law. There is nothing in the release that suggests or mentions a waiver of federal discrimination claims. Additionally, there was no evidence in the record of any consideration given to Bledsoe in exchange for his allegedly waiving his rights under the ADA and the Rehabilitation Act. Moreover, Bledsoe and his counsel provided affidavits to the district court stating that the only matters released were benefits for wage loss available under the workers' compensation law, thus creating an issue of fact as to what was released. The district court erred in granting summary judgment on this claim.

B. *Title II of the ADA*

The district court held that Title II of the ADA does not encompass employment discrimination. Bledsoe[3] urges this court to reverse and join several other courts which have held that Title II does encompass employment discrimination.[4] Our circuit has

3. Joining Bledsoe's position are the United States Department of Justice, the National Employment Lawyers Association, and the American Civil Liberties Union, which all filed *amicus* briefs with the court.

4. *See e.g., Doe v. University of Maryland Medical Sys. Corp.*, 50 F.3d 1261, 1264-65 (4th Cir. 1995); *Dominguez v. City of Council Bluffs,*

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not squarely addressed the issue, but two of our recent decisions have assumed or implied that Title II creates a cause of action for employment discrimination. *See Holbrook v. City of Alpharetta, Ga.*, 112 F.3d 1522, 1528-29 (11th Cir. 1997); *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1073 (11th Cir. 1996), *cert. denied*, 117 S.Ct. 1819 (1997). Our review of the statutory language of Title II, the Department of Justice's ("DOJ") regulations, our circuit's reference to the issue, and other courts' resolution of the issue, persuade us that Title II of the ADA does encompass public employment discrimination.

1. *The statutory language*

The ADA was implemented "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). In passing the ADA, Congress recognized that "society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of

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Iowa, 974 F.Supp. 732, 736-37 (S.D. Iowa 1997); *Hernandez v. City of Hartford*, 959 F.Supp. 125, 133 (D.Conn. 1997); *Davoll v. Webb*, 943 F.Supp. 1289, 1297 (D.Colo. 1996); *Wagner v. Texas A & M Univ.*, 939 F.Supp. 1297, 1309 (S.D.Tex. 1996); *Graboski v. Guiliani*, 937 F.Supp. 258, 267-69 (S.D.N.Y. 1996); *Silk v. City of Chicago*, No. 95C0143, 1996 WL 312074, at *10 (N.D.Ill., June 7, 1996); *Lundstedt v. City of Miami*, 1995 WL 852443, 5 A.D. Cases 568 (S.D.Fla. Oct. 11, 1995); *Bruton v. Southeastern Pa. Transp. Authority*, Civ.A.No. 94-CV-3111, 1994 WL 470277, at *2 (E.D.Pa. Aug. 19, 1994); *Ethridge v. State of Alabama*, 847 F.Supp. 903, 905-06 (M.D.Ala. 1993); *Eisfelder v. Michigan Dept. of Natural Resources*, 847 F.Supp. 78, 83 (W.D.Mich. 1993); *Finley v. Giacobbe*, 827 F.Supp. 215, 219-20 (S.D.N.Y. 1993); *Petersen v. University of Wis. Bd. of Regents*, 818 F.Supp. 1276, 1278 (W.D.Wis. 1993); *Bell v. Retirement Bd. of Firemen's Annuity & Benefit Fund*, 1993 WL 398612 (N.D.Ill., Oct. 6, 1993).

discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). Congress further recognized that disabled individuals face extraordinary barriers and discrimination by outright intentional segregation and often have "no legal recourse to redress such discrimination." 42 U.S.C. § 12101(a)(4) and (5). Moreover, in enacting the ADA, Congress hoped to increase employment opportunities for disabled people through prevention of employment discrimination. 42 U.S.C. § 12101(a)(3), (8), and (9).

The provision of Title II allegedly violated by the District in this action provides:

> Subject to the provisions of this [title], no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. "Public entity" is defined to include "(A) any State or local government; [and] (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; . . . ." 42 U.S.C. § 12131(1)(A) & (B).

The statutory language used by Congress in the creation of Title II is brief. Extensive legislative commentary regarding the applicability of Title II to employment discrimination, however, is so pervasive as to belie any contention that Title II does not apply to employment actions. The Report of the United States House of Representatives Judiciary Committee stated, "[i]n the

area of employment, title II incorporates the duty set forth in the regulations for Sections 501, 503 and 504 of the Rehabilitation Act to provide a 'reasonable accommodation' that does not constitute an 'undue hardship.' " *See* H.R.Rep. No. 101-485(III), at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 473. In explaining the forms of discrimination prohibited by Title II, the Report noted that:

> The Committee intends, however, that the forms of discrimination prohibited by section 202 [codified as 42 U.S.C. § 12132] be identical to those set out in the applicable provisions of titles I and III of this legislation. . . . In addition, activities which do not fit into the employment or public accommodations context are governed by the analogous section 504 regulations.

H.R.Rep.No. 101-485(II), at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367. The Report further notes: "The purpose of title II is to continue to break down barriers to the integrated participation of people with disabilities in all aspects of community life. The Committee intends that title II work in the same manner as Section 504." 1990 U.S.C.C.A.N. at 472-73.

It is significant that Congress intended Title II to work in the same manner as Section 504 of the Rehabilitation Act, because Section 504 was so focused on employment discrimination that Congress enacted subsequent legislation to clarify that Section 504 applied to other forms of discrimination in addition to employment discrimination. The first Supreme Court case to consider Section 504, *Consolidated Rail v. Darrone*, 465 U.S. 624 (1984), was an employment discrimination case. The Court stated:

> Among [the] purposes [of the Rehabilitation Act] as originally stated, were to 'promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment.' 29 U.S.C. § 701(8). . . . ¶ Section 504 neither refers explicitly to § 604 nor contains analogous limiting language; rather, that section prohibits discrimination against the handicapped under '*any* program or activity receiving Federal financial assistance.' And it is unquestionable that the section was intended to reach employment discrimination.

Id. at 626-632 (emphasis in original).

Part of the language of Title II prohibits public entities from excluding disabled individuals from "services, programs, or activities" or denying them the benefits of those services, programs, or activities. The district court in this case focused on the meaning of the words "services, programs, or activities." *Bledsoe v. Palm Beach Soil and Water Conservation Dist.*, 942 F.Supp. 1439, 1443 (S.D.Fla. 1996). The district court found that these words, "understood as a whole, focus [] on a public [] entity's outputs rather than its imputs [sic]." *Id.* The court characterized public employment as "an imput [sic]" that enables a public entity "to produce desired outputs, such as parks and schools." *Id.* at 1444. The court's analysis ignored the prohibition in the final clause of the section, which protects qualified individuals with a disability from being "subjected to discrimination by any such entity," and is not tied directly to the "services, programs, or activities" of the public entity. 42 U.S.C. § 12132. As the Second Circuit found in *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 44-45 (2d Cir. 1997), "the

language of Title II's anti-discrimination provision does not limit the ADA's coverage to conduct that occurs in the 'programs, services, or activities' of [a public entity]. Rather, it is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context, . . ." Accordingly, employment coverage is clear from the language and structure of Title II.

2. *DOJ regulations*

The DOJ regulations also support the position that Title II encompasses public employment discrimination.[5]

Congress specifically provided in the ADA statute that the DOJ should write regulations implementing Title II's prohibition against discrimination. 42 U.S.C. § 12134. The House Judiciary Committee Report provided:

> Unlike the other titles in this Act, title II does not list all of the forms of discrimination that the title is intended to prohibit. Thus, the purpose of this section is to direct the Attorney General to issue regulations setting forth the forms of discrimination prohibited.

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5. The district court noted its familiarity with the principle that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron- U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). However, the district court found that the plain language of the ADA, when read as a whole, does not support a cause of action for employment discrimination under Title II, and, therefore, *Chevron* deference was not applicable in this case. "[T]he Court does not believe that the conflicting legislative history sufficiently obfuscates the statute to create a vacuum of meaning for the Justice Department to fill." *Bledsoe*, 942 F.Supp. at 1449. The court concluded that when the language of the statute is plain, administrative interpretation of the statute is not entitled to deference. *Id.*

Appendix A

H.R.Rep. 101-485(III), at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 475.

In promulgating regulations pertinent to Title II, the Attorney General created a specific subpart in the Code of Federal Regulations ("CFR") addressing employment discrimination by public entities. These regulations state:

> (a) No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a public entity.
>
> (b)(1) For purposes of this part, the requirements of title I of the Act . . . apply to employment in any service, program, or activity conducted by a public entity if that public entity is also subject to the jurisdiction of title I [i.e. employs fifteen or more employees].
>
> (b)(2) For the purposes of this part, the requirements of section 504 of the Rehabilitation Act of 1973, as established by the regulations of the Department of Justice in 28 CFR part 41, as those requirements pertain to employment, apply to employment in any service, program, or activity conducted by a public entity if that public entity is not also subject to the jurisdiction of title I.

28 C.F.R. § 35.140.

There has been no modification to the regulations promulgated by the Attorney General. Rather, in 1997, the United

States Senate unanimously gave its consent to the printing in the Congressional Record of the Board of Directors, Office of Compliance regulation adopting the Attorney General's interpretation of Title II. *See* 143 Cong. Rec. S30-31 (January 7, 1997).[6] Also, as this court has stated, "[C]ongress is deemed to know the executive and judicial gloss given to certain language and thus adopts the existing interpretation unless it affirmatively acts to change the meaning." *Florida National Guard v. Federal Labor Relations Authority*, 699 F.2d 1082, 1087 (11th Cir. 1983).

Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), "considerable weight should be accorded to an executive department's construction of a statutory scheme," unless the regulations are "arbitrary, capricious, or manifestly contrary to the statute." The DOJ regulations provide clearly that Title II encompasses employment actions against public entities. The regulations are neither "arbitrary, capricious, [n]or manifestly contrary to the statute." *Id.* at 844. Thus, we cannot ignore the DOJ's reasonable construction of statutory language.

3. *Our court's reference to the issue*

In *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068 (11th Cir. 1996), *cert. denied*, 117 S.Ct. 1819 (1997), our court addressed the question whether a plaintiff suing under the ADA can recover for discrimination without showing that his disability was the sole cause for the adverse employment action taken against him. We answered the question in the affirmative. In discussing the issue, we noted that "[t]he stated purpose of the ADA is 'to

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6. We note, however, that these regulations do not become effective until they are approved by Congress and published in the Congressional Record. *See* 2 U.S.C.A. § 1384(d)(3).

provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.' " 99 F.3d at 1073, *quoting* 42 U.S.C. § 12101(b)(1). We acknowledged that Title I of the ADA applies to the private sector and provides for the elimination of disability-based discrimination. We then stated that "Title II of the ADA, *which applies to public sector employment,* contains a parallel provision." *Id.* (emphasis added). Later, we again assumed that Title II covered employment: "Title II (the public sector title)." *Id.* at 1074. Thus, without directly discussing the issue with which this court is presently faced, our court has assumed that Title II covers public employment discrimination.

Additionally, in *Holbrook v. City of Alpharetta, Ga.,* 112 F.3d 1522 (11th Cir. 1997), we addressed the question whether claims brought pursuant to Title II of the ADA involving events that occurred prior to the effective date of Title I are actionable under the ADA or the Rehabilitation, Act of 1973. In discussing this issue, we noted the language of Title II, the federal regulations promulgated pursuant to the ADA, and the Equal Employment Opportunity Commission ("EEOC") guide. 112 F.3d at 1528-29. The court then determined that "Title II thus incorporates by reference the substantive, detailed regulations prohibiting discrimination against disabled individuals contained in Title I." *Id.* at 1529. We further noted:

> The above regulations suggest that the provisions of Title II extending the protections afforded to employees in the private sector under Title I to state and local government workers became effective only when Title I went into effect. As explicitly described in the EEOC manual, the Rehabilitation Act provided a remedy for discrimination in public employment

> prior to the effective date of Tide I. We conclude that Title II of the ADA did not become effective until the date on which Title I became effective, July 26, 1992, and, prior to that date, a plaintiff's remedy for discrimination under Title II of the ADA was the Rehabilitation Act of 1973.

Id. Thus, the court implicitly determined that Title II was the "new replacement" for the Rehabilitation Act, which is what the legislative history indicates.

Although not decisions of our court, *Lundstedt v. City of Miami,* 1995 WL 852443, 5 A.D. Cases 568 (S.D.Fla. Oct. 11, 1995), and *Ethridge v. State of Alabama* 847 F.Supp. 903 (M.D.Ala. 1993), two district court decisions from within our circuit, held that Title II clearly encompasses employment discrimination by public entities. 5 A.D. Cases at 572-74; 847 F.Supp. at 906. The district court in *Ethridge* found that although a plain reading of Title II does not reveal whether it covers employment discrimination, the legislative history of and regulations promulgated under Title II make clear that the section prohibits employment discrimination by public entities on the basis of disability. The court noted that the primary purpose of Title II was to extend the reach of Section 504 of the Rehabilitation Act and that Section 504 "clearly applies to employment discrimination." 847 F.Supp. at 906, *citing Consolidated Rail Corp. v. Darrone,* 465 U.S. 624 (1984). The *Ethridge* court also discussed the House Report addressing Title II and the regulations implementing Title II to find that Title II covers employment discrimination.

Additionally, the *Ethridge* court noted the difference in the application of the exhaustion requirement which is mandatory in

Title I but not in Title II of the ADA.[7] The court found that although Title I requires exhaustion, Title II does not because it "incorporates the enforcement procedures of the Rehabilitation Act, . . . which do not require exhaustion of administrative remedies for non-federal employees." 847 F.Supp. at 907: "An analysis of Title II regulations further makes clear that, while resort to administrative remedies is optional, it is not required." *Id.* The court referenced the regulations, which plainly state that exhaustion is not required. *See* 28 C.F.R. § 35.172, Appendix A. We agree with this analysis and note that it is generally presumed that Congress acts intentionally and purposely where " 'it includes particular language in one section of a statute but omits it in another.' " *See Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972).

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7. The district court in this case expressed great concern in the inconsistency in the exhaustion requirement if the court found that Title II covered employment discrimination. "Acceptance of the 'no exhaustion rule,' when coupled with the slighting of Title II's plain meaning and the redundancy of Titles I and II, renders the entire statutory framework a monstrous distortion." 942 F.Supp. at 1445. The court further stated that:

> The statute the majority of the district courts (and the Justice Department) give us is completely bewildering: Both Title I and Titles II apply to employment, although Title II says nothing at all on the subject and Title I lays out a comprehensive scheme to deal with employment issues; Title I says an employer must hire 15 employees to be sued for employment discrimination, but you can get around this under Title II if your employer is an arm of the State; Title I says you must exhaust administrative remedies, but you can ignore this requirement too if you are employed by the State. If this is really what Congress meant, then the ADA surely must rank as one of the great drafting debacles of recent times. Unwilling to impute such sheer ineptitude to Congress, the Court must part company with the current consensus.

Id. at 1445-46.

4. *Other courts' resolution of the issue*

The only other circuit to consider this issue did not really discuss it. The court allowed a plaintiff to proceed against the employer/hospital under both the Rehabilitation Act and Title II. *See Doe v. University of Maryland Medical Sys. Corp.*, 50 F.3d 1261 (4th Cir. 1995). The court found that both Title II and the Rehabilitation Act "prohibit discrimination against an otherwise qualified individual with a disability." *Id.* at 1264. The court noted that the parties did not dispute that the Medical System was "a 'public entity' subject to the provisions of Title II of the ADA." *Id.* n.8. Accordingly, *Doe* does not provide much guidance on the issue before us for consideration.

In *Wagner v. Texas A & M University,* 939 F.Supp. 1297 (S.D.Tex. 1996), the court determined that a tenured professor could bring a Title II claim against the University when he was not rehired to his same position following a medical disability leave. In so finding, the court found that Title II obtains its remedies from the Rehabilitation Act, which does not require exhaustion of administrative remedies before filing suit. The court relied upon *Ethridge* in making its conclusion. In its discussion, the court noted that Title II encompasses employment actions. 939 F.Supp. at 1310. The court also discussed the policy anomaly created when Title II does not require exhaustion of administrative remedies. The court stated that Title I and Title II create "separate and distinct enforceable rights." *Id.* "Title I addresses primarily the rights of disabled individuals in workplaces, while Title II addresses the rights of disabled citizens *vis-a-vis* the government." *Id.* The court stated that this inconsistency "is undesirable from a policy standpoint;" however, given the DOJ's regulatory posture, the court would "not fill the gaps in the ADA in an attempt to effectuate a purported Congressional intent that

is not entirely evident." *See also Hernandez v. City of Hartford*, 959 F.Supp. 125 (D.Conn. 1997); *Graboski v. Guiliani*, 937 F.Supp. 258 (S.D.N.Y. 1996); *Silk v. City of Chicago*, No. 95C0143, 1996 WL 312074 (N.D.Ill. June 7, 1996).

In *Dertz v. City of Chicago*, 912 F.Supp. 319 (N.D.Ill. 1995), the court discussed whether plaintiffs must exhaust administrative remedies prior to bringing a claim under Title II of the ADA. The plaintiffs in *Dertz* were former police officers for the City of Chicago who had been placed on medical leave and were not allowed to return to their former positions. The plaintiffs filed suit under the Rehabilitation Act and Titles I and II of the ADA. The court relied on the district court's decision in *Petersen v. Univ. of Wisconsin Bd. of Regents*, 818 F.Supp. 1276 (W.D.Wis. 1993), to find that the procedural requirements of Title I do not apply to Title II plaintiffs. *Dertz*, 912 F.Supp. at 324-25. Because the court found that the plaintiffs were not required to exhaust their administrative remedies under Title II, their actions were allowed to proceed. *Id.* at 325. *See also Finley v. Giacobbe*, 827 F.Supp. 215, 219 (S.D.N.Y. 1993)).

The District cites other district court cases which have decided this issue as did the district court in this case. *See e.g., Decker v. University of Houston*, 970 F.Supp. 575 (S.D.Tex. 1997); *Iskander v. Rodeo Sanitary District*, No. C-94-0479-SC, 1995 WL 56578 (N.D.Cal. Feb.7, 1995), *aff'd*, 121 F.3d 715 (9th Cir. 1997)(Table). However, in light of the foregoing discussion, these cases are not persuasive. Even the district judge in this case noted that he was "swimming against the current," 942 F.Supp. at 1442, in deciding that Title II does not encompass employment discrimination claims.

In conclusion, we hold that Title II does state a cause of action for employment discrimination and reverse the district court's grant of summary judgment.

REVERSED and REMANDED.

Appendix A

HILL, Senior Circuit Judge, concurring specially:

I concur with reluctance.

In Part IIA, we conclude that the meaning and consequence of an unambiguous written release are subject to dispute, variance and avoidance because we, acting *in loco parentis,* find the adult parties to the contract in need of our patronage. Although troublesome, we apparently have such a role. *See Puentes v. United Parcel Service, Inc.,* 86 F.3d 196 (11th Cir. 1996).

In Part IIB, we find that Title II of the ADA (the Act) is carefully drafted to obfuscate.[1] Congress could have said "discrimination in employment" if it had wanted to do so. Here, however, it merely forbids the exclusion of qualified individuals "from . . . participat[ing] in or be[ing] denied the benefits of the services, programs or activities of a public entity" by reason of a disability.

The district judge concluded that the Act forbids discrimination *vis-a-vis* the "output of these public entities." *See Bledsoe v. Palm Beach Soil and Water Conservation District,* 942 F.Supp. 1439 (S.D.Fla. 1996). If a constituent is angered by the district judge's interpretation or our holding today, his or her Congressperson can say "That's not what we passed. I would *never* have voted for that! That's just the work of those activist judges."

So be it. The legislative power is vested in Congress. By concluding what Congress has done, are we legislating? I hope not.

With a tip of the hat to the district judge, I reluctantly conclude that the flow of precedent is too strong for him or for us to swim upstream, and I

CONCUR.

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1. The Act resembles the campaign address of a candidate appearing before an audience that was split on a key issue. The candidate observed, "Some of my friends are in favor of this proposition; some of my friends are a against it! As for me, I stand four square behind my friends!"

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED MARCH 25, 1998

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 96-5375

MARK BLEDSOE,

Plaintiff-Appellant,

versus

PALM BEACH COUNTY SOIL AND WATER CONSERVATION DISTRICT,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ____F.2d____).

Before: DUBINA and BARKETT, Circuit Judges, and HILL, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc

Appendix B

(Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA FILED OCTOBER 17, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 94-8360-CIV-RYSKAMP

MARK BLEDSOE,

Plaintiff,

vs.

PALM BEACH SOIL AND WATER CONSERVATION DISTRICT, et al,

Defendants.

ORDER GRANTING DEFENDANT PALM BEACH SOIL AND WATER CONSERVATION DISTRICT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came before the Court upon defendant Palm Beach Soil and Water Conservation District's Motion for Summary Judgment (DE 215), filed August 1, 1996. Plaintiff has responded in opposition. On September 20, 1996, the Court heard oral argument on the motion for summary judgment, and indicated that the motion would be granted.

BACKGROUND

This case arises from plaintiff Mark Bledsoe's four-year tenure as Resource Technician for defendant Palm Beach Soil and Water Conservation District ("the District"). The position

required that Bledsoe spend a large portion of his time walking, surveying, and performing manual labor in the fields. On February 26, 1990, while performing field work at Boynton Farm, plaintiff sustained an injury to the left knee. Upon the advice of his doctors that he should refrain from excessive walking and walking on uneven terrain, plaintiff requested some form of accommodation from his supervisor. In response, the District offered plaintiff the position of Resource Conservationist, but he rejected it. In October of 1992, the District terminated him.

On July 27, 1994, plaintiff settled his workers' compensation case. The parties signed a joint settlement agreement, which contained the following provision:

> As further consideration for the aforementioned payment, the Employee/Claimant agrees and does hereby release, discharge, and surrender any and all claims, whether or not asserted against the Employer/ Carrier or Servicing Agent, or any of its officers, agents, servants, employees, directors, successors, assigns, and any other person or entity so connected to the Employer/Carrier or Servicing Agent, of any nature whatsoever . . . .

Despite signing the release, plaintiff brought this action under the American with Disabilities Act (Title II of the "ADA"), 42 U.S.C. § 12131, and the Rehabilitation Act of 1973, 29 U.S.C. § 794 et seq., as amended by the Civil Rights Act of 1991, alleging that he incurred a disability for which the District provided no reasonable accommodation, and, as a result of which, the District terminated him from its employment.[1] The District has now moved

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1. The original complaint named both the District and Palm Beach County, and was brought under Title I of the ADA. The District is not covered by Title I, (Cont'd)

for summary judgment, arguing that the release bars plaintiff's action, and that his employment discrimination claim is not cognizable under Title II of the ADA.

LEGAL STANDARD

Federal Rule of Civil Procedure 56(c) sets forth the standard governing summary judgment. In its most basic form, summary judgment is appropriate where there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) ("the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.") (emphasis in original).

The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Once the moving party has met its burden, the party opposing summary judgment may not simply rely on the pleadings or mere denials of the allegations. Rather, the opposing party must adduce some evidence showing that material facts are in issue. *Anderson*, 477 U.S. at 256. "Rule 56(c) therefore requires a non-moving party to go beyond the pleadings and by [its] own affidavits or by the depositions, answers to interrogatories, and admissions on file designate specific facts showing that there is a genuine issue for

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(Cont'd)
because it does not have 15 or more employees. *See* 42 U.S.C. § 12111 (5)(A). The Court dismissed the County as a defendant by order dated July 27, 1995. On January 4, 1996, plaintiff filed his First Amended Complaint, now bringing an action under Title II of the ADA and the Rehabilitation Act. It is this complaint, and only the District as defendant, that are before the Court on this motion.

trial." *Celotex Corp. v. Carrett,* 477 U.S. 317, 324 (1986); *See also Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).

The Eleventh Circuit has restated the method for allocating burdens in a summary judgment motion. Specifically, in accordance with U.S. Supreme Court precedent,

> The moving party bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment.

Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991).

DISCUSSION

Defendant sets forth two reasons for the granting of summary judgment in its favor. The District argues that the release signed by plaintiff should be construed as a matter of law to prevent plaintiff from bringing this action, and that Title II of the ADA does not create a cause of action for discrimination in employment.

I. THE RELEASE

The release argument is no stranger to this Court. In its Omnibus Order of July 27, 1995, the Court considered the very same argument, but declined to hold, as a matter of law, that the release barred plaintiffs ADA and Rehabilitation Act claims. On

authority of *Barefoot v. Sears Roebuck & Co.*, 650 So. 2d 1036 (Fla. 1st DCA 1995), the Court found that the release was not so unambiguous under Florida law as to warrant dismissal of the action.

Developments since the issuance of the Court's Omnibus Order suggest that reconsideration of this issue would be appropriate. By Order dated February 18, 1995, Judge Hurley of this same district and division found that a virtually identical handicap discrimination claim was barred by the exact same release executed by Mr. Bledsoe. *FM. v. Palm Beach County*, 94-8229-CIV-HURLEY. The Eleventh Circuit affirmed without opinion, simply citing Eleventh Circuit Rule 36-1. *F.M. v. Palm Beach County*, No. 95-4465.

At oral argument, counsel for plaintiff suggested that the Eleventh Circuit's decision is not binding on this Court because the Court of Appeals failed to issue an opinion. This is not precisely what the rules say. Eleventh Circuit Rule 36-2 does say that unpublished *opinions* are not considered binding precedent, but merely persuasive authority. However, we are not dealing here with an opinion, but with what Rule 36 of the Federal Rules of Appellate Procedure denominates "an entry of judgment." Indeed, Eleventh Circuit Rule 36-1 is expressly about the entry of judgment *without opinion*. Therefore, Eleventh Circuit Rule 36-2, relating to unpublished opinions, has no effect on the question of whether entries of judgment have binding precedential value. Indeed, entries of judgment without opinion are binding. *United States v. Cagina*, 697 F.2d 915, 923 (11th Cir.) ("Affirmance without a published opinion is binding precedent for panels of the court, subject only to en banc consideration."), *cert. denied*, 464 U.S. 856 (1983). Whether this Court is "bound" by the judgment of the Eleventh Circuit or merely "persuaded," it will join Judge Hurley and the

Eleventh Circuit in finding that the release terminated plaintiffs right to sue for discrimination on the basis of handicap.[2]

II. SUITS FOR EMPLOYMENT DISCRIMINATION UNDER TITLE II OF THE ADA

Defendant also argues that a State employer does not violate Title II of the ADA by dismissing an employee on the basis of his handicap, because Title II does not relate to employment. Plaintiff responds that a majority of federal courts to consider the issue have held otherwise, and that the legislative history of Title II supports the employment discrimination cause of action. Although the Court recognizes that it may be swimming against the current, it concurs with defendant and holds that no cause of action for employment discrimination lies under Title II of the ADA. The Court notes, in passing, that resolution of this issue is not dispositive of this case because the release, discussed above, eliminates Bledsoe's claim, whether or not it is cognizable under Title II. Nonetheless, the Court feels that it would be remiss to avoid the Title II issue, which stands in sore need of careful and deliberate treatment.

1. The Split of Authority

The Eleventh Circuit has yet to pass on the question of whether Title II creates a cause of action for employment discrimination. The federal district courts, however, have split on the issue. At least one court has squarely held that Title II

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2. Plaintiff also argues that even if the County has been released from his ADA claim, the District has not. However, this Court has already found that the District, and not the County, was Mr. Bledsoe's employer. The release language explicitly refers to the "Employer," and the Court finds, as it has already found, that this refers to the District.

applies only to public services and programs, and, that it does not cover employment.[3] *See Iskander v. Rodeo Sanitary Dist.*, 1995 WL 56578 * 9 (N.D. Cal. 1995) ("Title II is inapplicable to the District's composition of employees."); *see also Dertz v. City of Chicago*, 912 F. Supp. 319, 325 (N.D. Ill. 1995) (distinguishing between suits for "employment discrimination" under Title I and for "discrimination in the administration of a public program" under Title II). The majority of the federal district courts to rule on the issue, however, have taken the view that Title II does comprehend a public entity's employment practices. *See Wagner v. Texas A&M Univ.*, 1996 WL 526272 * 6-7 (S.D. Tex. 1996); *Graboski v. Guillani*, 1996 WL 501891 * 10 (S.D.N.Y. 1996); *Silk v. City of Chicago*, 1996 WL 312074 * 10 (N.D. 111. 1996); *Bruton v. Southeastern Pennsylvania Transp. Authority*, 1994 WL 470277 * 2 (E.D. Pa. 1994); *Ethridge v. Alabama*, 847 F. Supp. 903, 906 (N.D. Ala. 1993); *Elsenfelder v. Michigan Dept. of Natural Resources*, 847 F. Supp. 78, 83 (W.D. Mich. 1993); *Finley v. Giacobbe*, 827 F. Supp. 215, 219-20 (S.D.N.Y. 1993); *Peterson v. University of Wisconsin Bd. of Regents*, 818 F. Supp. 1276, 1278 (W.D. Wis. 1993); *Bell v. Retirement Bd. of the Firemans Annuity and Benefit Fund of Chicago*, 1993 WL 398612 * 4 (N.D. Ill. 1993). At least one federal Court of Appeals

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3. Defendant cites a number of cases in which the court seems to assume that employment discrimination actions are only cognizable under Title I. *See Hutchinson v. United Parcel Service, Inc.*, 883 F. Supp. 379, 396-97 (N.D. Iowa 1995); *Harrelson v. Elmore County*, 859 F. Supp. 1465, 1468 (M.D. Ala. 1994); *Pinnock v. International House of Pancakes*, 844 F. Supp. 574, 578 n. 3 (S.D. Cal. 1993); *Kinney v. Yerusalim*, 812 F. Supp. 547, 548 (E.D. Pa.), *aff'd*, 9 F.3d 1067 (3d Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 1545 (1994). These cases are helpful insofar as they reiterate what appears to be obvious from the statute — that Title I deals with employment and Title II deals with public services. However, these courts did not specifically address the issue of whether a cause of action for employment discrimination is cognizable under Title II and their precedential force is therefore somewhat weak.

has agreed. *See Doe v. University of Maryland Medical Sys. Corp.*, 50 F.3d 1261, 1264-65 (4th Cir. 1995).

Although it respects the weight of the contrary authority, the Court finds itself unable to join the courts that have held (or assumed) that a cause of action for employment discrimination lies under Title II. Many of these courts have permitted an employment discrimination suit under Title II without discussing the issue at any length (or at all). The Court suspects that the presence of the Justice Department regulation discussed below, 28 C.F.R. § 35.140, has deterred defense attorneys from raising the employment issue, so that many of the courts have permitted the employment cause of action without full attention to the problems it poses. On the other hand, the Court is unpersuaded by the few opinions squarely addressing the issue, for the reasons explained below.

2. The Text of the ADA

In analyzing the meaning of Title II the Court begins at the logical starting point, the language of the statute itself. *See Bread Pol. Action. Comm. v. FEC*, 455 U.S. 577, 580 (1982) ("statutory construction 'must begin with the language of the statute itself'. . . ."), *citing Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 187 (1980). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

Title II provides that "[s]ubject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public

entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (hereinafter "Title II"). Public entities include "(A) any State or local government [and] (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131. Neither the definition section of Title II, 42 U.S.C. § 1213 1, nor the definition section for the entire ADA, 42 U.S.C. § 12102, defines the words that are crucial to this discussion: "services, programs, or activities."

The question, then, is whether the terms "services, programs, or activities" bear a plain meaning inclusive of the term "employment." As a matter of first impression, they do not. In a literalistic sense, a public entity's hiring decisions might be called "activities" of that entity (or one might say that the entity has a hiring "program"). However, the phrase "services, programs, or activities," understood as a whole, focuses on a public's entity's outputs rather than on its imputs. Other district courts have quite sensibly held that community services such as foster care programs, *Eric L. By and Through Schierberl v. Bird*, 848 F. Supp. 303, 314 (D.N.H 1994), and bond financing for housing projects, *Independent Housing Servs. of San Francisco v. Fillmore Center Assoc., DMJM,* 840 F. Supp. 1328, 1344 (N.D. Cal. 1993), are the sort of programs covered by Title II. These agency outputs, along with parks, recreational facilities, and similar government services, lie at the center of Title II's protection. *See Concerned Parents to Save Dreher Park Center v. City of West Palm Beach,* 846 F. Supp. 986 (S.D. Fla. 1994) (park center is a service covered under Title II).

Public employment, on the other hand, is not offered as a community service. Rather, it is an imput into the public entity that permits that entity to produce desired outputs, such as parks

and schools.[4] Indeed, several of the district courts to consider the Title II employment issue have recognized that the plain language of Title II does not appear to comprehend employment, or that it is at best silent on the issue. *See Wagner*, 1996 WL 526272 * 6 ("[I]t is not apparent from the plain language of § 12132 . . . that the prohibition against discrimination by public entities includes employment discrimination."); *Ethridge*, 847 F. Supp. at 905 ("A plain reading of this section does not reveal . . . whether Title II covers 'employment' discrimination. . . ."); *Silk*, 1996 WL 312074 * 10 (An employment cause of action is not expressly stated in Title II); *Peterson*, 818 F. Supp. at 1278 ("[I]t is not obvious from the plain language of § 12132 . . . that the prohibition against discrimination by public entities includes employment discrimination."). Although these courts proceed to find other reasons to extend Title II to employment, their initial comments provide compelling evidence that this Court is not alone in finding no textual basis for the employment discrimination cause of action in Title II.

Although the Court finds that the text of Title II, standing alone, does not support an employment discrimination cause of action, the textual inquiry should not end there. In ascertaining the plain meaning of a statute, a court should look not only to the discrete portion of the statute at issue, "but to the design of the statute as a whole and to its object and policy." *McCarthy v.*

4. The Court recognizes that the Supreme Court has construed similar language in the Rehabilitation Act to include employment. *See Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984). However, the Rehabilitation Act only applied to any "program or activity," and added that these were to be construed to include "all operations" of the covered entities. 29 U.S.C. § 794 (b). The Court believes that by adding the word "service," and creating an entire new section devoted to employment, Congress meant to bifurcate the ADA into one section dealing with public and private employment relationships, and one section dealing with government services.

Bronson, 500 U.S. 136, 139 (1991), *citing Crandon v. United States*, 494 U.S. 152, 158 (1990); *see also K Mart Corp. v. Cartier*, 486 U.S. 281, 291 (1988) ("In ascertaining the meaning of a statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."). In this case, the wholistic statutory inquiry lends further strength to the position that Title II does not cover employment.

The fundamental problem with including employment under Title II is that such a move renders Title I redundant, insofar as Title I applies to public entities. Title I applies explicitly, and exclusively, to employment: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 28 U.S.C. § 12112 (a). The term "covered entity" in Title I includes those who are "public entities" under Title II. *See* 28 U.S.C. § 12111 (2), (5) (covered entities are employers engaged in industry affecting commerce who have 15 or more employees, excluding the United States and a few others).[5] Thus, under the majority view in the district courts, public

5. In fact, the term "employer" in Title I is defined as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 12111 (5). Logically, for a person to sue a "public entity" for employment discrimination under Title II he would have to sue his public employer. If, however, an "employer" within the meaning of the ADA is one who employs fifteen or more employees, then a suit for employment discrimination would not lie against an employer of less than fifteen employees, even under Title II. The answer to this dilemma is that the definition of "employer" in section 12111(5) only applies to Title I and that Title II does not even contain the word "employer." But this answer only further compounds the problem by making one who is not

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entities with 15 or more employees may be sued for employment discrimination under either Title I or Title II. As one court put it, this position requires that "that Title I and Title II analysis coalesce in employment discrimination matters." *Graboski*, 1996 WL 501981 * 1996.

This result is unacceptable as a matter of statutory construction. It is a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys v. United States*, 485 U.S. 759, 778 (1988). Although Title I is not rendered *entirely* redundant by allowing an employment cause of action under Title II it is rendered redundant insofar as it applies to public entities with 15 or more employees. Additionally, in order to accept the majority position, one must believe that Congress intended that the 15 employee threshold for employment suits should not apply to public employers. But if this was Congress's intent, it could easily have spelled this out in the definition of "covered entity" in Title I. Indeed, when Congress wanted to make exceptions to the general definition of a "covered entity" it did so. *See* 42 U.S.C. § 12111 (5) (B) ("Exceptions"). If what Congress really meant to say is that all public entities are subject to the ADA in their employment decisions, it chose an exceptionally awkward means of expressing its intention. Given the choice between accepting the awkward and redundant formulation of the entire statute, and accepting what the Court finds to be the plain meaning of Title II, it readily choses the latter.

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an employer for purposes of Title I an employer for purposes of Title II. The net effect of accepting plaintiff's position in this case is that the concept of who is an employer has a different meaning under Titles I and II. Although words may mean different things in different contexts, it is strange to think that they would mean different things in two titles of the same statute, especially when the word is clearly defined in one title, and only implicit (if anything) in the other title.

Appendix C

A further textual incongruity arises from the majority position. Title I very clearly incorporates the procedures of Title VII of the Civil Rights Act of 1964, which require a plaintiff to file a charge with the Equal Opportunity Employment Commission before filing a claim in federal court. *See* 42 U.S.C. § 2000e-5(e) and (f)(1) (exhaustion requirement); 42 U.S.C. § 12117 (a) (Title I incorporation by reference). On the other hand, Title II adopts the remedies, procedures, and rights of the Rehabilitation Act of 1973, 29 U.S.C. 794 (a), which do not require exhaustion of administrative remedies. If plaintiffs may sue public entities for employment discrimination under either Title I or Title II, then they may simply sue under Title II and disregard the exhaustion requirement, even if the employer has more than 15 employees. And so the district courts in the majority have held. *See Peterson,* 818 F. Supp. at 127 8-79; *Silk*, 1996 WL 312074 * 10; *Wagner,* 1996 WL 526272 * 7, *Finley,* 827 F. Supp. at 219 n 3; *Ethridge,* 847 F. Supp. at 906-07.

Acceptance of the "no exhaustion rule," when coupled with the slighting of Title II's plain meaning and the redundancy of Titles I and II, renders the entire statutory framework a monstrous distortion. The statute Congress gave us was relatively straightforward: Title I would apply to employment; it would only bind entities employing 15 people or more; it would require exhaustion of administrative remedies. Title II would apply to government services; it would not depend on the size of the government entity; it would not require administrative remedies. The statute the majority of the district courts (and the Justice Department) give us is completely bewildering. Both Title I and Titles II apply to employment, although Title II says nothing at all on the subject and Title I lays out a comprehensive scheme to deal with employment issues; Title I says an employer must hire 15 employers to be sued for employment discrimination, but you

can get around this under Title II if your employer is an arm of the State; Title I says you must exhaust administrative remedies, but you can ignore this requirement too if you are employed by the State. If this is really what Congress meant, then the ADA surely must rank as one of the great drafting debacles of recent times. Unwilling to impute such sheer ineptitude to Congress, the Court must part company with the current consensus.

3. The Legislative History of Title II

In perhaps the most thorough opinion accepting a cause of action for employment discrimination under Title II, the *Ethridge* court relied heavily upon the ADA's legislative history. *See* 847 F. Supp. at 905-06. Although this Court has reservations about placing heavy reliance on legislative history, particularly in the face of a relatively unambiguous statute, it nonetheless considers it wise to address the arguments raised in *Ethridge*.

First, the *Ethridge* court found it relevant that a primary purpose of Title II was to extend the reach of the Rehabilitation Act "to all programs, activities, and services provided or made available by state and local governments or instrumentalities or agencies thereto, regardless of whether or not such entities receive Federal financial assistance." 847 F. Supp. at 906, *citing* H. Rep. No. 485(II), 101st Cong., 2d Sess. 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 366. The court further noted that the Supreme Court has construed the Rehabilitation Act to cover employment discrimination. 847 F. Supp. at 906, *citing Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 626 (1984). However, what is most notable about Congress's cross-reference to the Rehabilitation Act is that, in conjunction with the passage of the ADA, Congress explicitly cross-referenced the Rehabilitation Act back to *Title I* of the ADA, insofar as the Rehabilitation Act

relates to employment. "The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 . . . ." 29 U.S.C. § 794 (d). In other words, although the legislative history indicates that Congress wanted Title II to be coextensive with the Rehabilitation Act, Congress tied employment discrimination under the Rehabilitation Act to employment discrimination under *Title I* of the ADA. It would seem rather bizarre to find an employment cause of action in Title II of the ADA on the grounds that Title II is tied to the Rehabilitation Act, when the Rehabilitation Act itself ties its employment cause of action to Title I. When Congress said it wanted Title II to be coextensive with the Rehabilitation Act, it apparently did not mean to displace Title I as the ADA's vehicle for employment discrimination suits.

Second, the *Ethridge* court claims that "[t]he House Report's discussion of § 12132 further clarifies that Title II incorporates employment discrimination as proscribed in Title I and the Rehabilitation Act." 847 F. Supp. at 906. The court cites the following language from the House Committee Report:

> The Committee has chosen not to list all the types of actions that are included within the term "discrimination", as was done in titles I and II, because this title essentially simply extends the anti-discrimination prohibition embodied in [the Rehabilitation Act] to all actions of state and local governments. The Committee intends, however, that the forms of discrimination prohibited by [§ 12132] be identical to those set out in the applicable provisions of titles I and II of this legislation.

Id. at 906, *citing* H. Rep. No. 101-485 (II), 101st Cong., 2d Sess. 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 367. The continuation of the above-quoted passage offers further support for the *Ethridge* court's position: "Thus, for example, the construction of "discrimination" set forth in section 102(b) and (c) and section 302(b) should be incorporated in the regulations implementing this title." H. Rep. No. 101-485 (II), 101st Cong., 2d Sess. 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 367.

From this language the Court concludes that the framers of the House Report intended to cover employment decisions under Title II. The opinion of select members of one house of Congress, however, cannot take precedence over the plain meaning of the statute. The Supreme Court has warned against giving "authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute." *Shannon v. United States,* 512 U.S. 573, 114 S. Ct. 2419, 2426 (1994). A court may not "give effect to [a] snippet of legislative history" when so doing would require abandoning "altogether the text of the statute as a guide in the interpretative process." *Id.* "[C]ourts have no authority to enforce [a] princip[e] gleaned solely from legislative history that has no statutory point of reference." *Id., citing International Brotherhood of Elec. Workers, Local Union No. 474, AFL-CIO v. NLRB,* 814 F.2d 697, 712 (1987) (brackets in cited source).

The Supreme Court's admonition against using isolated snippets of legislative history as controlling guides to statutory construction proves itself wise in this case. Although the House report embraces the Title II employment discrimination cause of action, a different understanding appears from some of the debate in the Senate. Consider the following colloquy between Senators Harkin and Boschwitz:

Appendix C

Mr. Boschwitz.
I very frankly think that most Senators do not understand the implications of some of the provisions. Let me first, ask when you talk about employment, does the 15 or less employees mean full time or part time employees?

Mr. Harkin.
The term employer means a person engaged in industry effecting [sic] commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person except that for 2 years following the effective date of this title and [sic] employer means a person engaged in industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year and any agent of such person. It is the same definition as in title 7.

Mr. Boschwitz.
But it includes part-time employees. I gather from that definition, they do not all have to be there at once is that right? Fifteen or more employees for each working day. So they may have four or five in the morning and five in the evening and six or eight in the middle of the day.

Mr. Harkin.
It says 15 or more employees for each working day.

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Mr. Boschwitz.
But do they have to all be there at one time, I say to the Senator. Your staff is nodding their heads yes. Does that mean they will have to all be there at one time?

Mr. Harkin.
Well, if the Senator would just withhold for just a moment I will find out the exact answer. This is the same language that has been used in Title 7 for 25 years. So there must not be too much of a problem with it. If the Senator would just hold for a second we will find out if there has been any problem with it for 25 years.

Mr. Boschwitz.
I will ask another question.

Mr. Harkin.
Do you have another question?

Mr. Boschwitz.
I do. **I ask whether or not it would apply to townships, municipal governments, and counties and so forth?**

Mr. Harkin.
Yes, it does affect local governments.

Mr. Boschwitz.
It does effect all local governments?

Mr. Harkin.
Yes.

> Mr. Boschwitz.
> So even some people who are paid just a few dollars by a local government are included? This may well include even some very small localities? . . . .

135 Cong. Rec. S10734-02, *S10750 (Sept 7,1989) (emphasis supplied).

Additional evidence of the conflicting "intent of Congress" appears in the statements of Representative Miller, speaking in support of the ADA *as a whole.*

> This legislation will prohibit discrimination against individuals with disabilities in employment, programs or activities of a State or local government, in public accommodations, transportation, and telecommunications. It does so by providing protections that are consistent with other Federal civil rights laws long on the books. Its protections are far-reaching, yet the demands in [sic] places on compliance are modest. It initially exempts employers with fewer than 25 employees for the first 2 years, and therefore, employers with fewer than 15 employees . . . .

136 Cong. Rec. H2421-02, *H2448 (May 17, 1990) (statement of Rep. Miller).

From these admittedly ambiguous snippets of legislative history, it seems that at least some members of Congress understood the fifteen employee threshold of Title I to apply to state and local government, as well as to private employers. Certainly, these passages do not permit the Court to impute to

Congress an intention to make Title I (including its fifteen employee threshold and exhaustion of administrative remedies requirement) the exclusive vehicle for employment discrimination actions under the ADA. However, they sap the strength of the House Reports observation that employment actions are cognizable under Title II. At the very least, it must be, said that while some members of Congress understood Title II to comprehend employment, not all members of Congress shared this understanding. Even assuming that the members of Congress not affirmatively espousing the position of the House Report did not have a sufficiently clear understanding of the issue to express a negative opinion on that position, their assumption that the fifteen employee threshold applies to state and local government prevents the House Report from counting as the definitive "intent of Congress," if any such creature exists.

If this were a civil trial, in which the intent of Congress as manifested in the legislative history had to be proven by a preponderance of the evidence, the Court might find in favor of the Title II employment cause of action position. This is not such a case. The text of the statute is clear, and the legislative history conflicting. Having "no authority to enforce [a] principl[e] gleaned solely from legislative history that has no statutory reference point," *Shannon*, 114 S. Ct. at 2426 (citation omitted), the Court will not accord controlling weight to the House Report.

4. Deference to the Justice Department's Regulation

The difficulty with this Court's rejection of the Title II employment cause of action does not end with the legislative history. Acting pursuant to 42 U.S.C. section 12134, the Attorney General has promulgated regulations to effectuate subtitle A of Title II. These regulations include a prohibition against employment discrimination.

Appendix C

§ 35.140 Employment discrimination prohibited

(a) No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a public entity.

(b)(1) For purposes of this part, the requirements of title I of the Act, as established, by the regulations of the Equal Employment Opportunity Commission in 29 CFR part 1630, apply to employment in any service, program, or activity conducted by a public entity if that public entity is also subject to the jurisdiction of title I.

28 C.F.R. § 35.140.

The Court is, of course, familiar with the principle that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). It is also true, however, that "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n. 9. The Supreme Court has not hesitated to override regulations promulgated by administrative agencies when traditional tools of statutory construction render a result contrary to the agency's position. *See I.N.S. v. Cardoza Fonseca,* 480 U.S. 421, 446 (1987); *Dole v. United Steelworkers of America,* 494 U.S. 26, 42 (1990); *see also Estate of Cowart v. Nicklos Drilling Co.,* 505 U.S. 469, 475 (1992) ("In a statutory construction case, the beginning point must be the language of

the statute, and when the statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished."); *MCI Telecommunications Corp. v. American Telephone and Telegraph Co.*, 518 U.S. 218, 114 S. Ct. 2223, 2231 (1994) ("[A]n agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning the statute can bear . . . .").

The Court has previously remarked that the plain language of the ADA, when read as a whole, does not support a cause of action for employment discrimination under Title II. *Chevron* deference notwithstanding, the Court does not believe that the conflicting legislative history sufficiently obfuscates the statute to create a vacuum of meaning for the Justice Department to fill. When the language of a statute is plain, administrative interpretation of the statute is not entitled to deference. *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991). The meaning of Titles I and II of the ADA is plain enough as to the employment issue, and the Justice Department's regulation, therefore, is overruled.

5. Final Comments on the ADA Issues

The Court recognizes that it is taking an unusual step in parting with the overwhelming majority of the district courts (and at least one circuit court), in declining to follow the clear statement in the House Report, and in overruling a Justice Department regulation. This is, however, a case in which the plain meaning of the statute enacted by Congress, and not the intentions of individual members of that body or the judgment of lawyers at the Justice Department, must control. It seems to the Court that the process of statutory construction increasingly is moving in a direction in which secondary or tertiary means of ascertaining the meaning of a statute are replacing the traditional judicial

enterprise of reading the plain language of the statute as a whole. This has the effect of delegating ultimate lawmaking power to congressional committees (or subcommittees) and unelected bureaucrats. With all due respect to the members of congressional committees and the employees of administrative agencies, the Court believes that our republican form of government is best served when the courts apply the law as written, not as intended by some, or delegated to others.

CONCLUSION

The Court finds that plaintiff has contractually released defendant Palm Beach Soil and Water Preservation District from the claims at issue in this case. Additionally, the Court finds that plaintiff has not stated a claim under Title II of the ADA. Wherefore, it is

ORDERED AND ADJUDGED the defendant Palm Beach Soil and Water Conservation District's Motion for Summary Judgment (DE 215) be, and the-same is hereby GRANTED. An order granting final summary judgment in favor of defendant shall be separately entered.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 17 day of October, 1996.

s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

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APPENDIX D — PERTINENT PROVISIONS OF TITLES I AND II OF THE AMERICANS WITH DISABILITIES ACT OF 1990, 42 U.S.C. §§ 12111, *et seq.*, AND 12131, *et seq.*

TITLE I OF THE AMERICANS WITH DISABILITIES ACT OF 1990, 42 U.S.C. § 12111, *et seq.*

§ 12111. Definitions

As used in this subchapter:

* * *

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

* * *

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day, and each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a persons engaged in an industry affecting commerce

who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

* * *

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

* * *

Appendix D

§ 12117. Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

TITLE II OF THE AMERICANS WITH DISABILITIES ACT OF 1990, 42 U.S.C. § 12131, *et seq.*

§ 12131. Definitions

As used in this subchapter:

* * *

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Appendix D

§ 12132. Discrimination

Subject to the provisions of the subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

§ 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.